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U.S. House of Representatives

SUBCOMMITTEE ON EMPLOYEE BENEFITS
OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
207 CANNON HOUSE OFFICE BUILDING
Washington, D.C. 20515

Hearings on legislation*dealing with invasion of privacy

May 19, 1971

WITNESS LIST

Honorable Nick Galifianakis, M.C. 9:41

Honorable Robert E. Hampton
Chairman, U. S. Civil Service Commission 9:42 - 11:00
[illegible] & ACSA Gen Counsel
20 mins questions

Mr. Carl W. Clewlow
Deputy Assistant Secretary of Defense 1100-1125
for Civilian Personnel Policy

only Chairman
White 9:39, Brasco 9:40, Hogan 10:25, Wilson 10:25
left at 1000 left at 1100

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Testimony of Rep. Nick Galifianakis

Before the Employee Benefits Subcommittee

of the Post Office and Civil Service Committee

May 19, 1971

Mr. Chairman, it is a privilege for me to appear before your subcommittee to testify in behalf of H. R. 7969, and to support the presentation made by Senator Sam Ervin who is the originator of this measure.

For purposes of emphasis, Mr. Chairman, I should like to recapitulate some facts that I believe to be of utmost importance with regard to this legislation. First, the Senate has twice passed this or similar bills. Second, the bill itself offers a means for underscoring this country's constitution, specifically, the first amendment. Third, the bill deals with an identifiable, captive group within our society--federal employees. Their rights under the first amendment are being eroded daily because there are few guidelines to protect them from unjust administrative requirements. And fourth, the bill offers guidelines which allow members of the executive branch to distinguish between job security and national security. We have situations now where jobs are threatened and individuals are harassed over false issues of security or national well being. This bill is intended to clear away those false issues. The aforementioned facts are, I believe, the most compelling practical and philosophical reasons for enactment of this measure.

I would like to point out several aspects of this proposal which I believe to be its greatest strength. The bill provides a uniform guide for requirements made of government employees. Harassed and overworked administrators cannot be expected to make correct, impartial, or even just decisions regarding employees one hundred per cent of the time. These people need a specific law of reference. We in Congress can only provide the basic standards whereby administrators can guide their decisions. This bill establishes such a uniform guide for the conscientious officer who is anxious to achieve maximum benefit for the government and to serve individual rights at the same time. He will not need to sit and ponder whether to follow his conscience or an illegal order or whether or not to utilize a questionable scientific method. The law will state clearly what his own rights and duties are in certain areas. By the same token, it assures the rights of the individual employee and applicant.

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Another precedent clearly established in H. R. 7969 is the right to judicial recourse for employees or prospective employees who contend that their rights have been violated. We know that the Civil Service Commission has made a good faith effort to eliminate some of the privacy-invading practices of the federal government. Also, as a result of the complaints which the Senate Subcommittee on Constitutional Rights has sent to the Civil Service Commission some individual grievances have been remedied. But while isolated cases of injustice may be corrected by Congressional intervention, they do not, as with judicial decisions on the rights of criminals, establish a precedent for protecting rights of all employees. This bill would remedy that situation in section 4 by making specific provision for redress of grievances through a United States District Court. Section 5 of the bill establishes a Board of Employees' Rights which will have authority to receive, investigate and act on complaints of employees, thus offering a first course of action to the individual who seeks immediate attention to his problem.

I should like to illustrate the need for the safeguards in this bill with two examples. The first example of federal incursion into the private decisions of individuals was reported in my state in newspapers several years ago, and the charges recur, that the Andrews Air Force Base Hospital was forcing employees either to buy government bonds or to check a statement, "I do not accept my responsibility to support the President in this U. S. Savings Bond campaign."

The second case of governmental incursion was called to my attention recently by a minister in one of the towns in my own district. Civilian employees at an armed forces enlistment station received a verbal directive instructing them not to attend or discuss gatherings where the words "peace" and "love" and their symbols are used; and the verbal order was later followed by a written statement instructing them not to display evidence of attendance at such gatherings. I would impress upon the members of this committee that strict adherence to this directive would prohibit church attendance where obviously the words peace and love are used freely. This directive was issued after one of the civilian employees was heard by a supervisor discussing an anti Vietnam war meeting she had attended.

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These cases and others testify to the need for a bill to protect the private rights of government employees.

I might also raise the question at this point about a matter not covered by this bill. What about individuals under contract to the federal government but not specifically employed by it? Would they be guaranteed the rights of this act? I refer specifically to a bill I have introduced known as the Community Health Act, H. R. 2294. There are several similar bills pending at this time. My bill would place young doctors under contract to the government for a three-year period while they practice in medically deprived areas. According to the provisions of the contract, the Secretary of Health, Education and Welfare would pay off the debts incurred by their schooling while they serve an area where a doctor is needed. These individuals would not be formally employed by the Executive Branch but they would have a contractual relationship with it. Should they and others in similar categories be covered in this bill?

Finally, Mr. Chairman, let me comment on the question raised about threats to our national security which might arise through this measure. I am not wedded to any certain language in Sections 7, 8, and 9 of this bill. But on the issue of national security I would merely call the subcommittee's attention to a memorandum from the American Law Division of the Library of Congress submitted to this committee in testimony from Senator Ervin in July of 1968. This memorandum cites numerous statutory provisions designed to allow the CIA to maintain almost absolute secrecy about its operation and personnel. Additionally, it cites a series of criminal statutes which prohibit unlawful disclosure of confidential information respecting the national defense. All of these references are in your records of previous testimony. It is the conclusion of experts in the American Law Division that the bill does recognize the security interests which necessitate deviation from some of its provisions. The memo goes on to say that it is difficult to see how any determination by a federal court or the Employees' Board would involve government secrets. For the bill clearly states that the only matters for review or adjudication would be violations of some prohibition of the act. If a violation falls within the employee's official duty, the CIA, NSA, or FBI has the right

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under previous statute to claim official secrecy. The bill makes no attempt to deny the CIA, NSA or the FBI the right to execute secrecy agreements with its employees. Rather, the issue would turn upon whether specific provisions of H. R. 7969 have been violated. The memorandum from the Library of Congress concludes that a privacy bill such as this one would create little or no conflict with present laws regarding national security or confidential information on employees.

Mr. Chairman, such legislation as H. R. 7969 has been needed in the past to help protect our liberties. From what you have heard in past days, it must be obvious that it is needed now. If the present trends are any indication, it will be vitally needed in the future. I urge you to consider the data pointing to need for action and to make your judgment in light of the overwhelming evidence before you.

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STATEMENT OF ROBERT E. HAMPTON,
CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION BEFORE THE
SUBCOMMITTEE ON EMPLOYEE BENEFITS OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES ON

H.R. 7199, H.R. 7969, and S. 1438, Bills "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

May 19, 1971

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

We are pleased that you have requested the views of the Civil Service Commission on the proposed legislation which you have so correctly described in your letter of invitation to be a "most important matter." This is the first opportunity that the present Administration has had to present its views on the matter in a public hearing.

Quite obviously, no one would oppose the stated purposes of the proposed legislation. The protection of the constitutional rights of Government employees and the prevention of unwarranted invasions of their privacy are among the most fundamental objectives of Federal personnel administration. Under no circumstances should the price of Federal employment be the relegation of the individual to "second class citizenship." The problem in the area of employee relations with which we are concerned lies in the task of achieving a fair and reasonable balance between the protection of the legitimate rights of employees and the obligation of managers and supervisors to see that the business of Government is performed effectively and efficiently. Our opposition to the proposed legislation is based on the fact that it will not achieve that balance or the purposes sought in either a fair or effective manner. I will explain that statement during my testimony this morning.

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My testimony is directed to the language in S. 1438 which is identical to H.R. 7969 and, for the most part, also identical to the language in H.R. 7199. In the few places where the language differs regarding the coverage of the Federal Bureau of Investigation, the Central Intelligence Agency and the National Security Agency we will note those differences. My testimony is directed to S. 1438 because some of it refers to testimony given earlier by Senator Ervin with respect to legislation of the same type he has introduced in the past. My testimony is, however, fully applicable to the same section and subsection designations in H.R. 7199.

The prohibitory language in section 1 of S. 1438 is, with few exceptions, unchanged from the time the first bill of this nature was introduced in 1966. That fact, in and of itself, is in my opinion a valid objection to the bill. Times have changed; policies and practices have changed; new beneficial procedures and rights for employees have been created over the past 5 years; and reports on earlier bills have consistently pointed out the need for language changes, but the bill is still couched in almost the same terms and is still directed against the same invasions of "alleged" constitutional rights which we believe have long since been corrected when warranted and which, if they should reoccur, are susceptible of what we believe is a more effective means of correction than this bill would provide.

Over the years since 1966 the Senate Subcommittee on Constitutional rights has referred a number of specific cases to the Civil Service Commission some of which we found did warrant corrective action. But those instances have been relatively few in number and not of a character that we feel warrants special legislation of this type. If there really is the large number of these cases that has been alleged, we frankly do not understand why the labor organizations within Government, with the effective grievance procedures which many of those

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organizations helped to structure through negotiated agreements, have not brought those cases up for resolution. This is particularly so when you consider that since August 1966 when the first bill of this type was introduced the number of Federal employees represented by labor organizations has grown from 1,054,000 to last November's count of 1,542,000--an increase in union representation of from 40% of the covered work force to 58% of that work force.

When I referred to invasions of "alleged" constitutional rights a few moments ago I did so deliberately. While I am not a lawyer, I never heard of a constitutional right that would be violated by asking selected employees to report their financial interests in order to protect the Government against conflict of interest involvement. If some part of the Constitution is violated by requiring such a disclosure, then the Senate itself has been violating that constitutional right for years when in its "advice and consent capacity" it requires prospective Presidential appointees to make those very same disclosures only in more detail and in public (ours are made and kept in confidence).

Also, what part of our Constitution entitles an employee who is (to use the words of section 1(K) of the bill) "under investigation for misconduct" (such as smoking in a restricted area of a munitions storage depot) to have his attorney present before his supervisor can ask him whether or not he was smoking? If there is such a constitutional right it surely is not limited to Government employees and I believe our business leaders and industrial supervisors in the private sector will be amazed to learn that such discourse with an employee is unconstitutional.

But I will leave to the lawyers the question of whether the matters covered by the bill are really matters of constitutional right because I want

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to devote sufficient time to calling the Subcommittee's attention to what I, as an executive officer charged with responsibilities in the area of Federal personnel management, regard as particularly bad legislative proposals in the bill.

When Senator Ervin testified before this Subcommittee on July 2, 1968, he said the bill then under consideration which was identical in purpose to the ones under discussion today dealt with specific violations of the First Amendment rights of applicants for and employees of, the Federal Government. He also said the bill (at that time it was S. 1035)--and I quote--"does not affect the power of the executive branch to deal with employees within the proper confines of the employment relations." In the same vein, the Senator said the bill would not affect--and again I quote--"the authority of Federal managers to manage". I must respectfully but emphatically disagree with the Senator's appraisal of the bill's effect.

I have already given you the example of the supervisor who would not be allowed to ask the employee if he was or was not smoking which strikes me as a quite severe curtailment of the proper authority of a Federal manager to manage. Consider also what restrictions would be placed on proper management by section 1(d) of the bill.

Section 1(d) would bar a supervisor from requesting an employee to report on any of his activities unless they are related to the performance of official duties which are or may be assigned to him, or the skills which qualify him for those duties, or unless there is reason to believe he is engaged in conflict of interest activities. That provision could prevent the Civil Service Commission from asking an employee about an alleged violation of the Hatch Act; it could bar inquiries in areas relating to national security and employee safety; and it could prevent the resolution of complaints received

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from a citizen about the outside conduct of a Government employee. For example, a supervisor may have received information that an employee who operates heavy industrial equipment has been drinking heavily during his off-duty hours and is keeping such late hours that his job efficiency could in time be impaired. As we read section 1(d), the supervisor could not ask the employee for a report on these matters and, presumably, would have to wait until the employee's condition became such as would justify the inquiry as being related to the performance of the employee's duties. Even then, as explained earlier, the supervisor could not discuss the matter with the employee unless the employee had his attorney present.

Now we are confident that incongruous results such as these were not intended but we have offered simple, clarifying amendatory language to prevent these results and none of it has been adopted. This is why we are seriously concerned over the bill; it is still drafted in the same 1966 language even though the seriously adverse effect of that language on proper management prerogatives has been clearly spelled out in earlier reports.

This Subcommittee has the expertise to understand and deal with the very fundamental issues raised by the proposed legislation. In order for the business of Government to be carried out effectively and efficiently, the managers and supervisors in Government (just as their counterparts in the private sector) must have the proper authority to manage and supervise. What we ask is that you give fair consideration to the marked extent that this bill would interfere with the exercise of those proper authorities.

Some of that interference could seriously damage Governmental efficiency. Today, within the executive branch, we have an ethical conduct program designed to prevent employees who occupy positions which could involve them in conflict

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of interest situations from any inadvertent involvement in those situations. The regulations under which that program operates are open for all to examine; they are published in the Code of Federal Regulations. Our program stresses the confidential treatment of the financial interest statements filed by employees and expressly provides a means to resolve a complaint by an employee who feels his position is one that should not require that he file such a statement.

I want to emphasize that our ethical conduct program is a preventive one; we do not (as sections 1(i) and 1(j) of the bill would require) wait and ask for a report on specific items tending to indicate a conflict of interest. We get the information in advance and by examining it, and consulting with the employee as necessary, conflicts involvements are avoided. The restrictive language of the two subsections mentioned would negate, for all practical purposes, the ethical conduct program within the executive branch. We have explained this in detail in the past and we have submitted amendatory language to correct what we regard to be serious errors in the drafting of those subsections but none of that language has been adopted. I cannot bring myself to believe that the Congress intends to terminate the ethical conduct program of the executive branch. But as we find the same unchanged language used year after year we cannot be other than disturbed over what appears to be a lack of real appreciation of what that language would do.

I have not taken the separate subsections of section 1 of the proposed legislation up in their order of appearance because I wanted to make certain important points clear to the Subcommittee from the start. I will, however, now go back and starting with subsection (a) of section 1 I will discuss those

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provisions which I urge the Subcommittee to give careful consideration. What I urge you to consider is whether or not these provisions interfere with proper--and I emphasize the word "proper"--management authorities.

Section 1(a) is a good illustration of why we feel the bill is out of date. Section 1(a) would prohibit an official from requesting an applicant or employee to disclose his race, religion, or national origin. The executive branch used such a self-disclosure method only once and that was in 1966. For the past 4 years we have used the visual identification method which is not proscribed by the proposed legislation. So in that regard the prohibition in the bill does not concern us. What does concern us, however, are the inferences that when we collect data on race, religion, or national origin we do it for the purpose of determining a person's qualifications. Nothing could be farther from the truth.

The Civil Service Commission authorizes the collection of race or national origin data by visual identification under strict controls which are spelled out in the Code of Federal Regulations. [Subpart C of Part 713 of Title 5, Code of Federal Regulations.] This is done in keeping with merit system principles to further the policy of Congress set out in section 7151 of title 5 of the United States Code to insure equal employment opportunities for all our citizens without regard to race, religion, national origin or other irrelevant considerations. In order to achieve the goal of real equal employment opportunity it is essential that we have statistical information showing how different races fare in obtaining Federal employment and in advancing in that employment to their full potential. Congress authorized that to be done among private employers by the Civil Rights Act and the Equal Employment Opportunity Commission does just that--requires private employers to collect data on their employees' color, race, sex, and national origin.

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If this activity is good and proper to do among private employers, why do the proponents of this bill ascribe an invidious intent to the Commission when we require it among executive branch employers?

Please understand that we are clearly aware that the prohibition in the proposed legislation is against self-disclosure of one's race, religion, or national origin. We have no objection to that general prohibition but we do object to the repeated erroneous inferences that these data are collected to determine a person's qualifications. In addition, we object to the language in the bill which would prevent an executive official from making an inquiry that would enable him to resolve a complaint by an employee that he has been discriminated against because of his race, religion, or national origin. Senator Ervin testified in 1968 that he thought it would be "very difficult to tell a Presbyterian by the way he parts his hair". We agree with that conclusion by the Senator and unless we can ask about the religious composition of a segment of an agency's work force with regard to which a discrimination complaint is pending there is no realistic way to decide if it is true that a named supervisor never hires or promotes protestants or catholics or whatever the charge encompasses. Bias against 10 00 workforce

Once again I ask the Subcommittee to consider what is required of proper executive branch management. Are we to turn away such a complaint with the explanation that a Congressional enactment prevents its resolution? That seems to us to be a serious interference with proper executive management particularly in view of the fact that the Equal Employment Opportunity Commission makes precisely the same kind of inquiry of private employees in enforcing the counterpart provisions of the Civil Rights Act.

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We explained in our report last year on S. 782 to the Subcommittee on Manpower and Civil Service how section 1(a) could be amended to prevent it operating as a bar to the proper resolution of discrimination complaints. All that is needed is to add a simple proviso to the effect that the subsection does not prohibit a request for information concerning race, religion, or national origin when the matter is in issue in a discrimination complaint case. But, again, the amendatory language was not used.

At this point I ask permission to include in the present record the Commission's report on S. 782 as that report is directly applicable to the proposed legislation now being discussed as it is identical thereto in all substantive respects.

The Commission has no objection to section 1(b) now that the legislative history shows the Congressional intent with regard to the operation of that provision which relates to an agency taking note of employees' attendance or nonattendance at meetings unrelated to their official duties. The Senate Report [No. 91-873] on S. 782 specifies that section 1(b) is designed to protect employees from being compelled to attend meetings on political, social, and economic matters unrelated to their employment. The Report specifies that the subsection does not affect the existing authority of agencies to promote health and safety or to advise of agency sponsored activities or savings bond or charity fund campaigns.

We have only a minor problem with section 1(c) in that it could be interpreted so as to interfere with worthwhile activities such as the blood donor program as we do request employee participation in that program and the program is not related to employees' official duties. To prevent the subsection from causing a result not intended, a brief proviso is needed to prevent the

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subsection from being interpreted as prohibiting the use of publicity to inform employees of requests for assistance by public service organizations such as the Red Cross.

I have already covered section 1(d) and we can accept section 1(e) without amendment. The language in section 1(e) prohibiting the interrogation of an employee about his "personal relationship" with a relative will not interfere with inquiries needed to resolve nepotism cases under section 3110 of title 5 of the United States Code as those inquiries relate to "relationship" alone as distinguished from "personal relationship".

Section 1(f), which relates to the use of polygraphs, is not of concern to the Civil Service Commission as we do not use those instruments. In that regard we feel the Subcommittee should give careful attention to the submissions of the Executive agencies that deal with intelligence, counter-intelligence, and international-affairs matters such as the recognized security agencies and the Department of Defense and the Department of State.

At this point I want to call the Subcommittee's attention to the one difference between S. 1438 and H.R. 7199. The Senate bill, in section 9, excepts the Federal Bureau of Investigation from the bill entirely. The House bill, in section 6, excepts the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency from the polygraph and psychological test prohibitions and the prohibitions against the submission of a financial disclosure statement when the head of the agency concerned makes a personal finding that the test or financial statement is required to protect the national security. The Senate bill limits that partially excepting provision to the Central Intelligence Agency and the National Security Agency by reason of its complete exception of the Federal Bureau of Investigation.

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Section 7 of the House bill and section 8 of the Senate bill provide guarantees that the bills will not operate to prevent the heads of these security agencies from withholding information pursuant to statute or Executive order and bar the use of such information in any proceeding authorized by the proposed legislation.

In addition, the Senate bill provides in section 7 that no employee of the Central Intelligence Agency or the National Security Agency and no individual or group acting in behalf of such an employee may use the grievance or judicial review procedures under the bill without first submitting the grievance to his agency. The section also preserves to the heads of those agencies their statutory authority to terminate employees when that termination is required in the interests of the United States.

The Civil Service Commission accedes to the views and judgments of the three security agencies regarding these provisions but we do have one observation that may aid the Subcommittee in considering this matter. Within the executive branch we have recognized that because of the extremely sensitive nature of the duties of the employees of these security agencies it is not appropriate or in the interests of the United States to cover them into the usual personnel provisions. For two recent examples of their exclusion I call the Subcommittee's attention to Executive Order No. 11491 relative to labor-management relations which allows their exclusion in section 3 and to the new Part 771 of the Civil Service Regulations relative to employee grievances and administrative appeals which excludes those security agencies. In our best judgment we believe that each of these security agencies should be completely excepted from the proposed legislation in the same way the Federal Bureau of Investigation is excepted in section 9 of S. 1438.

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Returning now to section 1 of the proposed legislation, we regard subsection (g) of that section to be out of place in these bills. Subsection (g) is a prohibition against coerced political activity by Federal employees. The coverage of the subsection is almost identical to sections 7321 through 7324 of title 5 of the United States Code. Also, the subsection is largely duplicative of section 602 of title 18 of the United States Code which makes it a crime for a Government official or employee to directly or indirectly solicit a contribution "for any political purpose whatever" from another Government official or employee.

While the Commission favors the objective of protecting Government employees against any form of coerced political action or support, we do not believe that such a provision is dependent on a constitutional right or belongs in proposed legislation of the type with which we are dealing. Also, as I indicated earlier, we do not consider it proper to enact duplicative legislation.

If the Subcommittee believes that strengthened political activity protections are needed for Government employees we urge that this be done by way of separate legislation that would take into consideration the statutory protections now on the books and supplement them as required rather than enacting duplicative legislation that could result in confused enforcement.

Section 1(h) is another instance of what we consider an unnecessary and outdated legislative proposal. Actually what subsection (h) does is express the executive branch policy which prohibits the coercion of employees to invest in Government bonds or to make charitable donations. For example, the "Manual on Fund Raising within the Federal Service for Voluntary Health and Welfare Agencies", December 1967 edition, stresses "true and voluntary giving" and

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expressly states: "Any practice that involves compulsion, coercion, or reprisal directed to the individual * * * employee because of the size of his contribution or his failure to contribute has no place in the Federal program." Moreover the Manual specifies that employees should be informed that if they believe the executive branch policy against coercion has been violated, they may file a complaint under the agency's grievance procedure or directly with the Civil Service Commission without going through the agency's grievance procedure.

With respect to the sale of United States Savings Bonds, the executive branch policy, as set by the United States Savings Bond Division of the Treasury Department is that the use of coercion in the promotion of bond sales is contrary to the objectives of the program and a violation of Government policy. Executive agencies are alert to the prohibition against coercion and in that regard I call the Subcommittee's attention to issuances by the Secretary of the Navy (SECNAVNOTE 5120 of 1 April 1971), the Postmaster General (memorandum of March 16, 1971), the Chief of Staff of the Air Force (memorandum of 6 March 1971), and Department of the Army Circular No. 608-36 of 9 March 1971, each of which stresses the voluntary nature of the bond sales program and warns against the use of pressure or coercion.

The point I want the Subcommittee to consider with regard to subsection (h) is the same that I have made reference to with regard to other subsections. The statutory provision is not necessary as there is already in existence a clear and adequate administrative control that will accomplish exactly what the proposed statute would do. Please understand that we are aware that a few overzealous individuals have violated our administrative provisions and

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used coercive tactics. But no provision, whether administrative or statutory, can be guaranteed against breach by what Senator Ervin so aptly described last week as "all manner of fools and their follies." We believe, however, that the existence of the administrative provisions, which are enforceable through established grievance procedures, evidence that a statutory provision of the type proposed in subsection (h) is not necessary. However, as the subsection is wholly in keeping with our policy we have no objection to its enactment with the one minor clarifying language change. That change would substitute the word "section" for "subsection" on line 9 of page 6 so that neither subsection (c) nor (d) is interpreted as negating the proviso in subsection (h).

I have already covered subsections (i) and (j) relative to financial disclosures under the ethical conduct program. But in passing I note that Senator Ervin indicated in 1968 when he testified before this Subcommittee that he had complaints from professional employees in high-ranking positions over the requirement that they file financial statements. The Senator states "No one in the executive branch has listened to them. That is why Congress must." I cannot help but wonder if those complaints arose before June 9, 1967, when we added a specific right for an employee who felt he should not be required to submit such a statement to file a grievance. If the complaints were submitted after that 1967 date, I would wonder if the complainant made use of the procedure available to him and if not -- why not?

Section 1(k) is the provision I have already discussed which could entitle an employee to have his attorney present whenever his supervisor made inquiry of him about a matter that could lead to disciplinary action.

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The final subsection of section 1 (subsection (l)) is unobjectionable as it would, quite properly, prohibit any disciplinary or retaliatory action against an employee who did not comply with a request, or submit to an action, made unlawful by the proposed legislation.

Section 2 would make the prohibitions in section 1 applicable to the officers and employees of the Civil Service Commission. If section 1 and the counterpart provisions in section 2 are amended as we have recommended, we would have no objection to section 2. Similarly, we do not object to section 3 which, in effect, makes the section 1 prohibitions applicable to commissioned officers and members of the armed forces provided, again, our amendments of section 1 are adopted.

Section 4, however, is another matter. That section authorizes summary judicial intervention into the management of the executive branch which both we in the executive branch and the judicial branch believe is totally uncalled for. Under section 4 an applicant or employee would be able to sue a Federal officer or employee, in his individual capacity, on the basis of an allegation that the Federal officer or employee had violated or threatened to violate the bill's prohibitions. Moreover, that law suit could be started without the exhaustion of available administrative remedies and without any showing of pecuniary injury. Such summary judicial intervention is completely out of keeping with the long-established principle of sound judicial administration that an individual is not entitled to turn to the courts for judicial relief until he has exhausted his available administrative remedy.

An even more peculiar aspect of this provision is the fact that while section 5 sets up an elaborate administrative remedy for handling the grievances covered by the bill through a new Executive agency (the Board on Employees' Rights), section 4 does not require that an applicant or employee

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file his grievance with that Board and exhaust that administrative remedy before going directly to court. That peculiar aspect of the bill is referred to on page 60 of the report of the proceedings of the Judicial Conference of the United States issued December 18, 1969, by Chief Justice Warren E. Burger. In that report the Conference expressed its disapproval of section 4 by noting that the section -- and here I quote from the Report -- "would give the employee the right to go directly into the Federal courts. Inasmuch as section 5 of the bill provides for the utilization of the administrative process by the aggrieved employee, the Conference disapproved section 4 as being inconsistent with the provisions of section 5." With the permission of the Chairman I would like to include into the record at this point a copy of pages 60 and 61 of the Judicial Conference Report containing the disapproval to which I have referred.

Another facet of section 4 that we consider objectionable is the provision which requires the Attorney General to defend any officer or employee sued under the section who acted pursuant to an order, regulation, or directive, or who, in the opinion of the Attorney General, did not willfully violate the provisions in the bill. With all due respect for the Attorneys General, for whom I have always held the greatest respect, this provision would make him become what might be termed a "prejudgment judicial officer." By that I mean that once a law suit is filed against an officer or employee for an alleged violation of the bill, the Attorney General would have to decide first whether the officer or employee acted pursuant to an order or regulation and, if he did, then decide if the employee willfully violated any proscription in the bill. Frankly, if the Attorney General makes those decisions adversely to the employee and decides not to defend the employee, and the employee shows up in court with a private attorney, the court will know that his case has been prejudged by the Attorney General and the employee will, in effect, be starting out with 3 strikes

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against him. If any type of access-to-court provision should be included in the legislation, and we hope it is not, we strongly urge that the Attorney General have a free hand to defend any officer or employee without any statutory requirement for a prejudgment determination on his part.

Section 5 would create a new Executive agency (the Board on Employees' Rights which I will refer to as "the Board"). The Board would be composed of 3 part-time members appointed by the President, by and with the advice and consent of the Senate, whose function would be to hear and decide grievances filed under the bill. The Board would have a small staff -- I say small because the bill places a limitation of $100,000 on the expenditures to carry out section 5 -- which would investigate any complaints received and within 10 days from the date of receipt of a complaint set a hearing on the complaint. Within 30 days after the hearing (which would be held in accordance with the administrative procedure statute insofar as possible), the Board would issue a final decision. If the Board found a violation, it could issue a cease and desist order, or direct that the offending civilian officer or employee (other than a Presidential appointee appointed by and with the advice and consent of the Senate) be disciplined. The discipline could range from reprimand to removal. In the case of a Presidential appointee, the Board would make a report on the violation to the President and the Congress. In the case of a member of the armed forces, the Board would refer the matter to a person authorized to convene a general courts-martial.

There are many aspects of section 5 that we feel are bad, but in our judgment the worst aspect of it is that the creation of the Board would amount

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to a Congressional rejection of executive branch efforts to maintain an affirmative, cooperative labor-management relations program. Each of the eleven basic prohibitions in section 1 are matters that in whole or in part could be the subject of negotiations between a Government labor organization and management and each of the items that prompted these provisions (for example a coerced bond purchase) is something that is susceptible to settlement under an agency's grievance procedure. And, again, I want to point out that an appreciable number of those grievance procedures exist because of negotiated agreements between a labor organization and management. We are convinced that this is the right way to resolve employee grievances and that to segregate these eleven grievances for processing under the formal administrative procedure rules designed for the use of regulatory agencies would create an adversary action under a negative concept wholly at odds with the objective of achieving an affirmative, cooperative labor-management relations program.

Closely related to our first objection to section 5 is our second objection which is that there is no logical reason for creating a new Executive agency whose limited purpose is to resolve eleven types of grievances while all other grievances and the more serious matters of appeals relating to adverse actions (such as demotions, suspensions, and removals) are to continue to be processed under the currently operating agency and Civil Service Commission procedures. I find it impossible to understand the rationale that allows an employee who has been asked (not ordered, just asked) to donate blood to the Red Cross, to hail his supervisor into a Federal

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court or file a complaint for processing through a separate Executive agency under the complexities of the administrative procedure statute, while his coworker who has been fired on grounds he believes are false, processes his appeal through the normal administrative channel and only after exhausting that administrative remedy is he entitled to judicial review.

I want to emphasize that I do not question the authority of the Congress to make it "unlawful" -- that is the word used in section 1 -- to request an employee to participate in the blood donor program, but I do question whether the Congress intentionally would make the correctional processes for a breach of such a relatively inconsequential unlawful act markedly more elaborate and complex than those it has authorized for the far more serious unlawful act of removing a veterans' preference employee on baseless charges.

There is also a practicable objection to the creation of the Board. While we have no way to estimate the number of complaints such a Board would receive, we believe its very creation would prompt some applicants and employees with either real or imagined grievances to file complaints. Assuming these complainants reside in different parts of the country we cannot help but wonder how this Board with its small staff and no field offices could possibly cope with even a minor workload. Keep in mind, also, that the Board members are part-time officers whose other regular employment would be bound to prevent their ready availability for travel either about the country to hold hearings or to the Board's central office to decide

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the grievances. We assume the Board members will have other regular employment as their pay is fixed in section 5 at $75 a day which is approximately the same daily rate for an employee in the 10th step of grade GS-12. I consider it rather unrealistic to expect to employ Presidentially appointed officers to head up an Executive agency at such a low salary, but if they can be found they will surely need some regular outside employment or income beyond this part-time appointment.

The Subcommittee should also note that section 5 would create a conflict between the Board's statutory rights and the statutory rights of the Civil Service Commission. For example, section 5 authorizes the Board to "order" an employee's removal. We assume that such an order would be directed to the employing agency and that the agency would comply with it. The employee who was so removed would, under the veterans' preference statute and the competitive-service job protection program established under the civil service statutes, have the right to appeal the removal to the Civil Service Commission. In such an appeal, the regulations of the Commission provide that the employee is entitled to a hearing at which he is represented by an attorney, a union officer, a veterans organization, or other counsel. If that hearing establishes that the employee's removal was not justified, the Commission will order his agency to restore him which entitles him to back pay benefits under the back-pay statute. We do not consider it reasonable to enact legislation that creates this kind of conflict of authorities.

In brief we see no need for a Board of the type referred to in section 5 and feel that such a Board if established would be unable to cope with the task put upon it and would create serious intra-executive branch conflicts.

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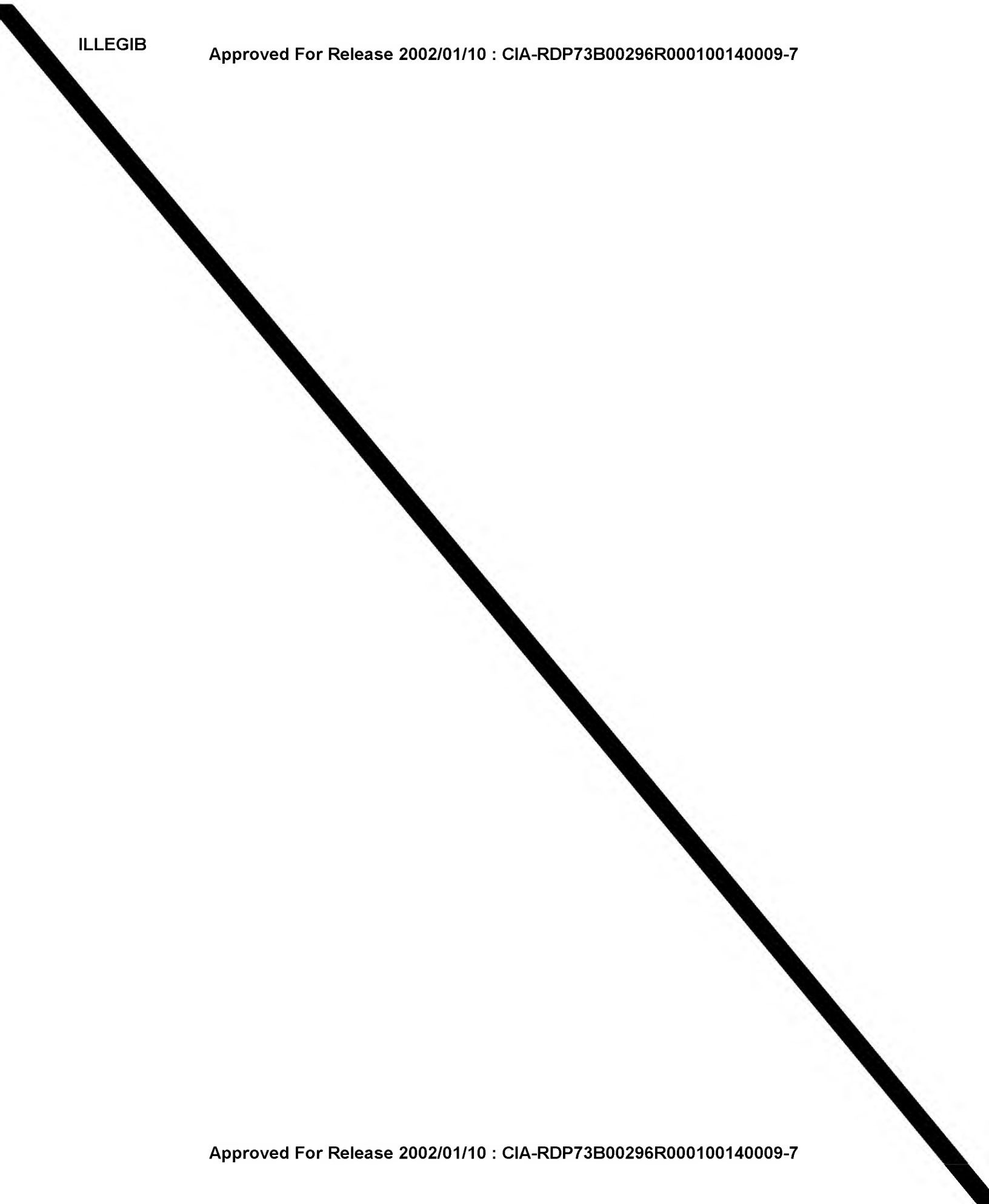

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The only substantive section on which I have not commented is section 10. That section initially provides that neither the establishment of the Board nor the right of summary recourse to the courts prevents an agency from having a grievance procedure to enforce the provisions of the bill, but the section then negatives that initial provision by providing that the existence of such a procedure would not require an employee to use it and he could take his grievance directly to a court or to the Board. Section 10 also states that if an employee elects to go to the Board under section 5 he waives his right to go to court under section 4 and vice versa.

In conclusion, I hope I have been able to persuade the Subcommittee to focus on what we sincerely believe are provisions in the proposed legislation that are sorely in need of elimination or modification. I want to stress to the Subcommittee that all we ask of you is a fair consideration of the many ways that this proposed legislation would interfere with the proper management of the executive branch. I have no doubt that the proposed legislation, when originally drafted approximately 5 years ago, was motivated by a genuine concern that legislation was needed to protect employees of the Government with regard to several aspects of their employment. But this is 1971 not 1966 and if there is any need for legislation of the type proposed--which we feel has not been established--there is an equal need that it be drafted with care so that the business of Government is not restricted by unwarranted restraints on proper management actions.

We have, in the past, offered to make the Commission's staff available to prepare a bill that would achieve every reasonable and necessary protection of employee's rights while it concurrently recognized the reasonable and necessary requirements of executive branch management. I renew that offer today, and I am confident that joint cooperation in this regard will benefit all concerned.

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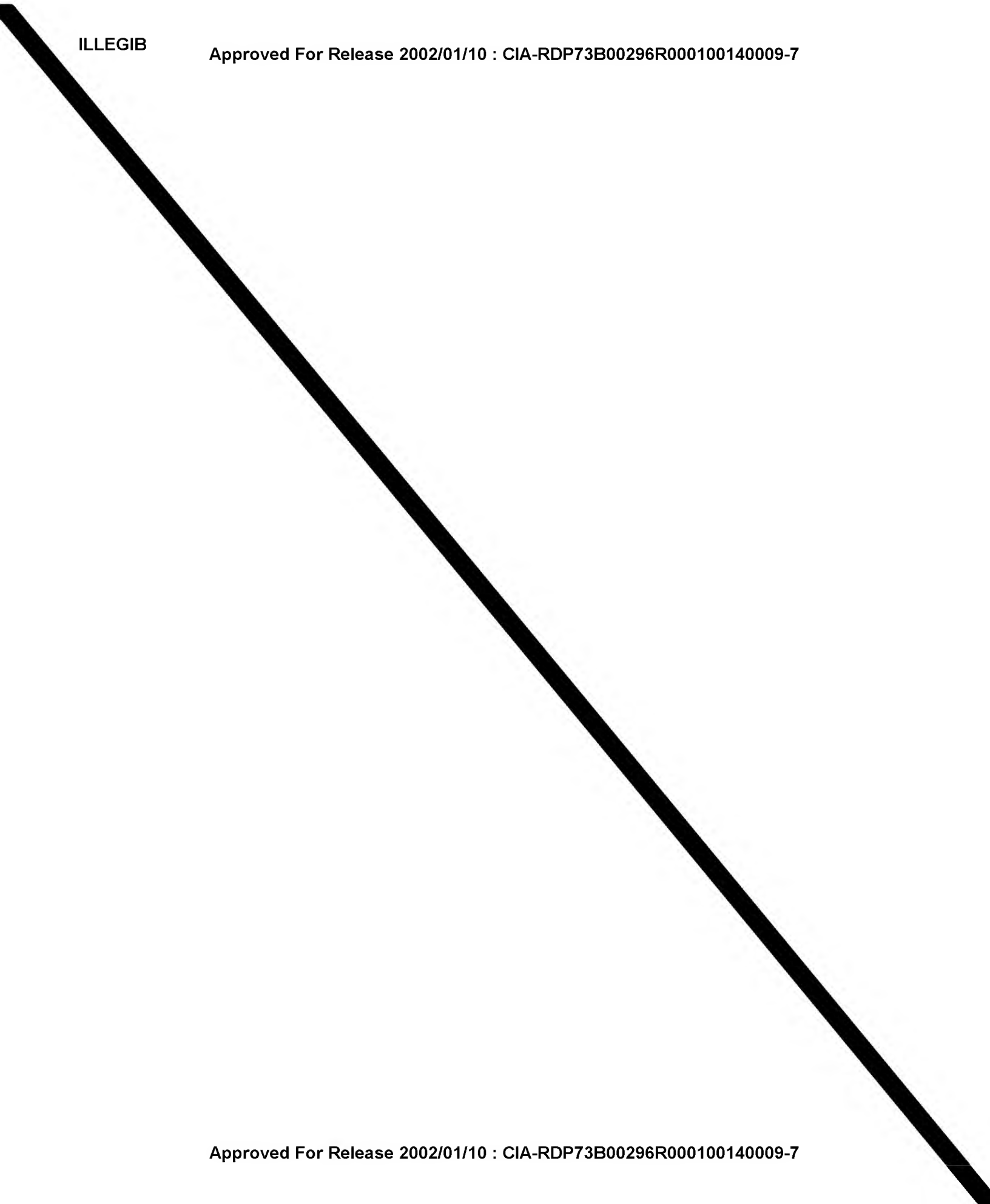

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STATEMENT OF CARL W. CLEWLOW
DEPUTY ASSISTANT SECRETARY OF DEFENSE
(MANPOWER AND RESERVE AFFAIRS)
BEFORE THE SUBCOMMITTEE ON EMPLOYEE BENEFITS
OF THE COMMITTEE ON POST OFFICE AND
CIVIL SERVICE OF THE U.S. HOUSE OF REPRESENTATIVES
ON

H.R. 228, 92d Congress, A Bill, "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

H.R. 7199, 92d Congress, A Bill, "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

H.R. 7969, 92d Congress, A Bill, "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

... to summarize in interest of time

May 19, 1971

1100

Mr. Chairman:

I am Carl W. Clewlow, Deputy Assistant Secretary of Defense, (Manpower and Reserve Affairs). Accompanying me are Robert T. Andrews, from the General Counsel's office of the Department of Defense, Charles Trammell, from the Office of Security Policy of the Department of Defense, Carl Burghardt, from the Office of the Deputy Chief of Staff, Personnel, Department of the Army, Philip Meyerson, Director, Personnel Management Division, Department of

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the Navy, and Leonard G. Berman, Chief, Employee Programs Division, Directorate of Civilian Personnel, Department of the Air Force.

The Department of Defense is pleased to testify on the proposed legislation now before you -- H.R. 228, H.R. 7199, and H.R. 7969. During my testimony today, I will discuss those provisions in which the Department of Defense is in full accord, those which we believe require modification or deletion. Where appropriate, I will offer amendatory language in order that the Department's position may be clearly defined.

On June 18, 1968, it was my privilege to testify before the Subcommittee on Manpower and Civil Service of the Committee on Post Office and Civil Service on S. 1035, 90th Congress. At that time, Defense submitted a 13 page report on why it opposed enactment of S. 1035 in its present form. In the course of that testimony, I addressed the legislation from the standpoint of its adverse impact on both the personnel administration, and the national security activities of the Department.

In the 91st Congress, Defense filed a similar report with the House Post Office and Civil Service Commission on S. 782 in which it reiterated its opposition, and again pointed out the considerations which

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led to our position. Included in the report were suggested revisions. In our opinion, the revisions did not do violence to the basic principles underlying the legislation.

Notwithstanding what we considered to be valid objections, these bills have been reintroduced in the 92nd Congress in almost the same language. The failure to incorporate little, if any, of our suggested amendments is frankly disappointing. Perhaps it is a reflection on our abilities as advocates, rather than any lack of Congressional responsiveness. I shall try to do better today. For this reason, I especially welcome the opportunity to again present the Defense Department's views.

I shall not dwell at length on the distinctions between the bills now before the Committee. H.R. 228 is modeled after earlier versions of the "Employee Bill of Rights" in that it does not contain exceptions like those found in H.R. 7199 and H.R. 7969. The latter two bills are similar, although not identical. For example, H.R. 7969 exempts the Federal Bureau of Investigation completely, whereas H.R. 7199 provides for only limited exemptions. Also H.R. 7969, unlike H.R. 7199, provides that Central Intelligence Agency and National Security Agency employees must first submit a written complaint before filing a suit or seeking relief from a Board on Employees' Rights. Today I will address my remarks principally to H.R. 7199 which has been introduced by Congressman Wilson.

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The words "invasion of privacy" have a familiar ring in today's world. There is a growing national consciousness of the need to preserve individual liberties, especially in a society which is increasingly depersonalized. Consequently, the "rights of the individual" take on added significance. When I speak of individuals, I include civilian employees of the Government. I wish to emphasize that the Department is in full accord with the Subcommittee Chairman's statement of April 1, 1971 that "Federal employees, too, have all the rights enjoyed by other Americans. They should be equally protected from unwarranted investigations of their private lives when it has no relation to their ability to perform their work."

It is not enough, however, to say that we are for motherhood -- against sin -- and against invasion of privacy. The real problem, as we see it, is to design legislation which balances the equities between the individual and the Government he serves. We believe the proposed legislation does not. Let me make it plain. The Defense Department is not here to oppose safeguards against the invasion of privacy. But we are here to define with greater precision just what those safeguards should be.

From the standpoint of Department of Defense operations, H.R. 7199 should not be enacted for the following reasons:

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1. The prohibitions in section 1 unduly restrict the Department in the performance of certain of its personnel management functions, and in the performance of certain of its national security responsibilities.

2. The provisions of section 4 permitting an employee to bring suit in the United States District Court without exhausting his administrative remedies both unduly burdens the court and undermines agency grievance and adverse action procedures.

3. The provisions of section 5 creating a Board on Employees' Rights to handle complaints duplicate present grievance machinery and seriously disrupt employee-management relationships.

Over and above these considerations is the fact that H. R. 7199 should be drafted in the form of an amendment to title 5 of the United States Code. Further, it contains a number of provisions that are badly in need of clarification. Contrary to the assertions of a previous witness, it is not written in "plain English." Examples of these legislative drafting deficiencies, as well as our substantive objections will be summarized in my testimony today. A more detailed analysis may be found in the Attachment to my Statement.

Section 1 of the bill contains a number of "shall nots" as it applies to management's relationships with its employees and applicants for

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employment. A number of these provisions reflect policies with which the Department is in full agreement. For example, the Department fully supports the proposition that bond drives be voluntary, rather than coercive in nature. DoD Directive 5035.1, "Fund-Raising Within the Department of Defense," dated September 22, 1964, spells out this principle of voluntariness in the following words:

> "Any practice that involves compulson, coercion, or reprisal directed to the individual serviceman or civilian employee because of the size of his contribution or his failure to contribute has no place in this program and is therefore prohibited."

Likewise, the Department supports the proposition that an employee should not be required to attend meetings that have no bearing on his official duties or work skills. Similarly, the Department deems it improper to take notice of an employee's failure to attend such meetings. It also believes that an employee should not be subjected to demands to support a political candidate.

The Defense Department, however, objects to the unfortunate overbreadthof these legislative proposals. For example, under section 1(b) the Department cannot take notice of meetings held by "outside parties or organizations" covering matters unrelated to the employee's

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position. The net effect of this provision is that the Department could not take notice of the fact that one of its employees may have attended a meeting in which a group conspired to bomb the Capitol. This may have been unitended by the drafters, but the fact remains that notice of such a bomb conspirary meeting would be proscribed by H. R. 7199 as now written.

In section 1(d) an employee may not be required to make a report about his outside activities unless they relate to his official duties, the development of his work skills, or constitute "a conflict with his official duties." If the Department received a report that an employee was engaged in political activities in violation of chapter 73 of title 5, United States Code, it could not even request, let alone require, an explanation unless it established that these particular activities were "in conflict with his official duties." In many fact situations, these activities might have no relationship with his official duties, let alone be in conflict with them. Similarly, if the Department learned that an employee had been seen in the company of foreign intelligence agents, it would have to find that this association was "in conflict with his official duties" before it could question him. Obviously, the Department could not ascertain that fact until it made some inquiries of the employee. Again, the language of the bill fails to take into account situations where the Department should be entitled to make inquiries.

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In section 1(e) the Department is prohibited from asking an employee about his "personal relationship" with any person connected with him by blood or marriage. The term "personal relationship" is not defined. Since questions about sexual conduct are also barred, it must refer to general day-to-day relationships. If the Department learned that an employee occupying a sensitive position was believed to be married to a suspected foreign agent it would be prohibited from questioning the association. Especially where an employee occupies a critical-sensitive position the Department should expect a higher degree of trustworthiness, and with it broader latitude to examine his suitability for such a position.

In section 1(f) the Department is prohibited from asking an employee to take a polygraph test regarding his "personal relationship" with his relatives, his religion or his sexual conduct. Under certain circumstances, polygraph tests should be permitted in specific cases which cannot otherwise be resolved. Under DoD Directive 5210.48, "The Conduct of Polygraph Examinations and the Selection, Training and Supervision of DoD Polygraph Examiners," July 13, 1965, polygraphs may be authorized but only if the individual voluntarily consents. If he does not so consent, no adverse action may be taken against him. But

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if H.R. 7199 is enacted polygraph examinations will be virtually discontinued except under the extremely limited conditions specified in section 6.

The restrictions on the use of polygraph by the Department of Defense are not paper restrictions. During the entire calendar year 1970 the military departments report that only a limited number of polygraphs have been conducted among the more than 1,142,063 employees of the Department of Defense. In a number of these cases, polygraph examinations were requested by the employee in support of his contentions.

In section 1(i) the Department is prohibited from requiring an employee to disclose, or even ask about, his or his family's income and debts. For national security reasons, the Department believes this prohibition unwise. DoD Directive 5210.7, "Department of Defense Civilian Applicant and Employee Security Program," September 2, 1966 provides that "Any excessive indebtedness, recurring financial difficulties, [and] unexplained affluence" may furnish grounds for questioning an employee's eligibility for a security clearance. The past history of security defection cases reflect that a large number of them resulted from an employee's financial difficulties. Consequently, it is in the best interests of national security that the Department be permitted to make appropriate inquiries where the employee is assigned to a position

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affecting the national security. I might add that these inquiries are of benefit to the employee in that they afford him an opportunity to explain or deny reports about his financial difficulties. Oftentimes, his response may make unnecessary disciplinary or removal actions.

In addition to national security considerations, DoD has a personnel management interest in ensuring that its employees observe ethical standards of conduct. A limited number of employees are required to submit statements of their financial interests, including those of their immediate household, for the purpose of determining whether those interests conflict with the performance of their official duties. Executive Order 11222, "Prescribing Standards of Ethical Conduct for Government Officers and Employees," May 8, 1965, has been implemented by the Department of Defense in the form of DoD Directive 5500.7, "Standards of Conduct," August 8, 1967. This Directive specifically provides for the submission of a "Confidential Statement of Employment and Financial Interest" by employees paid at the level of the Executive Schedule and by those engaged in Government grants and procurement. The demands by the public for scrupulous avoidance of real or apparent conflicts of interest require such financial reports, and thus outweigh considerations of personal privacy. That this principle of reporting financial interests is recognized by the House of Representatives is reflected by the financial statements filed by the House members each year with the House Committee on Standards of Official Conduct.

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In section 1(k) the Department may not question an employee "who is under investigation for misconduct" without the presence of counsel or other person of his choice if he so requests. The words "who is under investigation for misconduct" is subject to varying interpretations. The Department has no objections to the presence of counsel if there is a formal criminal investigation underway. But whether the same requirement should apply to a supervisor's preliminary inquiries about minor infractions of the safety rules is a horse of another color. If such an inquiry without counsel subjects a supervisor to disciplinary action, the Department strongly objects.

Turning to section 4, the provision giving unlicensed freedom to file a civil action in the U.S. District Court without regard to the customary jurisdictional prerequisites is patently unsound. The filing of frivolous and even spurious suits will be certainly encouraged, for a plaintiff need show no pecuniary injury, and no exhaustion of administrative remedies. All he need do is allege that one of his section 1 "rights" has been violated. He need not even go to the Board of Employees' Rights established by section 5. But he can start a Departmental grievance proceeding under section 8, accompanied by the employee organization representing his bargaining unit, then abandon that action before final decision, and bring suit in the U.S. District

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Court. At this point he could tell his local union to "go to Pittsburgh" and permit "any employee organization" he elects to represent him. The result is disruption to the Department's grievance procedures, inherent conflict with employee-management relationships established by Executive Order 11491, and an overburdened Court calendar. As to the latter, I understand that the Judicial Conference of United States is already on record as opposed to this provision.

In the light of the considerable representations by the Civil Service Commission against this provision, as well as the strong opposition expressed by the Department of Justice in reporting on previous proposals of this nature, I shall not further elaborate. It suffices to note that this "smorgasbord" of administrative and judicial proceedings could arise simply over the fact that an employee was mistakenly asked by his employer whether he belonged to the Rotary Club, an "unlawful act" under section 1(d).

The Board of Employees' Rights established by section 5 to hear and decide complaints under the Act has been justified on the grounds that agency grievance procedures are cumbersome, time-consuming and weighed on the side of management. But here is how a typical grievance case would be handled under H. R. 7199. Let us suppose that an employee accuses the supervisor of failing to promote him, and of coercing him into buying bonds. The supervisor responds by charging the employee

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with tardiness and with failing to attend a local ~~political~~ Bond rally. The question of his promotion and his tardiness would be decided under normal agency grievance procedures -- but the coercion with respect to buying bonds and attending ~~political~~ Bond rallies would have to be decided by a Board of Employees' Rights. And, of course, the employee could elect to take the latter two issues into court, either immediately or after pursuing agency grievance procedures. The result is a piece-mill division of what oftentimes is basically the outgrowth of work conflicts between a supervisor and employee. This is most certainly a cumbersome procedure, and if the employee avails himself of the full set of remedies, a time-consuming one as well.

As to the allegation that an agency is slow in processing appeals of adverse actions, Civil Service regulations provide that the agency must act within 60 calendar days after the employee has filed his appeal. If action has not been completed, the employee may elect to terminate his agency appeal by appealing directly to the Commission. The effect of these regulations is to spur agencies to make timely disposition of their cases.

As to the allegation that Departmental procedures do not provide a fair means of resolving employee-management conflicts, the following figures may be of interest to the Committee.

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	Item	No. of Cases	No. of Employees Sustained
Army	Appeals of disciplinary actions	247	52
Army	Grievances	600	74
Navy	Appeals of disciplinary actions	433	142
Navy	Grievances	860	361
Air Force	Appeals of disciplinary actions	209	112
Air Force	Grievances	245	62

In order that there may be time for questioning, I shall not dwell on the extremely sensitive national security missions performed by Defense, and the special security requirements applicable to the National Security Agency. Nor shall I dwell on the fact that the provision authorizing an outside body to reprimand, suspend and remove those violating the Act derogates from the responsibilities of the employing department. As for these matters, your attention is respectfully drawn to the Section-by-Section Analysis attached to this Statement.

The Department is not a Johnny-Come-Lately to the proposition that an individual's rights should be respected. For example, some four years before "employee rights" legislation was first introduced, the Office of the Secretary of Defense issued a comprehensive policy statement to the three military departments on the subject "Civil

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and Private Rights." Portions of that November 26, 1962 memorandum, which have been incorporated in Service regulations, deserve quotation here today. It reads in part:

> "In order to insure that inquiries and interrogations conducted in the course of security investigations and adjudicative proceedings do not violate lawful civil and private rights, or discourage lawful political activity in any of its forms, or intimidate free expression or thought, it is necessary that investigators and members of security review boards have a keen and well developed awareness of and respect for the rights of the subjects of inquiries and of other persons from whom information is sought."

It continues by stressing the need to avoid irrelevant inquiries in these words:

> "Care must be taken not to inject improper matters into security inquiries whether in the course of security investigations or other phases of security proceedings. For example, religious beliefs and affiliations or beliefs and opinions regarding racial matters, political beliefs and affiliations of a nonsubversive nature, opinions regarding the constitutionality of legislative policies, and affiliations with labor unions are not proper subjects for such inquiries.

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"Inquiries which have no relevance to a security determination should not be made. Questions regarding personal and domestic affairs, financial matters, and the status of physical health, fall in this category unless evidence clearly indicates a reasonable basis for believing there may be illegal or subversive activities, personal or moral irresponsibility, or mental or emotional instability involved. The probing of a person's thoughts or beliefs and questions about his conduct, which have no security implications, are unwarranted."

I recognize that to promulgate a policy does not insure that everyone will "get the word", or that every supervisor will forever avoid being swept away by zealousness. But I think it important to stress that from the standpoint of over a million man work force the infractions that have been reported are relatively infrequent, and generally involved a localized incident. Contrary to the representations of some, the Department has not found a deliberate, widespread pattern of disregard of the rights of employees. Under these circumstances, the provisions of H.R. 7199 calling for summary judicial intervention represent considerable "over-kill." This is especially so since the Executive Branch has initiated a number of affirmative actions over the past several years to insure that those serving in Government are, in the words of your Chairman, "equally protected from unwarranted investigations of their private lives when it has no relation to their ability to perform their work."

I thank you for the opportunity to be heard.

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SECTION BY SECTION ANALYSIS OF H. R. 7199, 92nd CONGRESS

Section 1(a) would prohibit, with certain exceptions, inquiries about an employee's race, religion or national origin or that of his forebears. It is recommended that the second proviso beginning on page 2, line 8 be amended to read, in part: "Provided further, That nothing contained in this subsection shall be construed to prohibit inquiring concerning the citizenship or the national origin of any employee or of any person seeking employment, or the national origin of any person connected with either by blood or marriage, when such inquiry is deemed necessary or advisable ***." (emphasis added) The need for broadening the category of persons exempted is especially important where an applicant or an employee is to be assigned to overseas areas where coercion might be brought against him or his close relatives.

Section 1(b), in protecting an employee against compulsory attendance at meetings, forbids taking notice of an employee's participation in subversive activities or with other groups whose interests might be hostile to United States interests. Such a restriction is strongly opposed by the Department, and is contrary to well accepted security practices. Accordingly, it is recommended that a proviso be added to section 1(b) reading, as follows: "Provided further, That nothing in this subsection shall be construed to prohibit taking notice of the participation of an employee in the activities of organizations, groups, and movements deemed relevant to the national security."

Section 1(c) would prohibit requiring an employee to participate in activities unrelated to his official duties or to the development of work skills. It is assumed that the term "official duties" is to be broadly construed and that it would not bar issuing instructions and guidance to persons assigned to sensitive duties. For example, such employees may be required to report security violations, attend security indoctrination lectures, and report definite indications of mental instability and other unusual behavior on the part of other similarly assigned employees. With the understanding that these precautionary measures are part of the "official duties" of every such employee, the Department of Defense interposes no objection to this section.

Section 1(d) would prohibit requiring or requesting an employee to make any report concerning his activities or undertakings unless they relate to the performance of his official duties, the development of his

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work skills, or there is reason to believe that he is engaged in outside activities or employment in conflict with his official duties. The Department recognizes that this provision was designed to eliminate certain improper reporting practices, and in this respect we support the principle behind this provision. However, there are some instances in which there is a good and sufficient cause for requiring such reports. For example, it may be necessary to determine whether an employee is engaged in political activities proscribed by the Hatch Act. Obviously, the best way to ascertain the facts is to ask the employee for an explanation. It is also important that an employee assigned to sensitive duties report any approach by known intelligence agents, his planned travel to communist-controlled countries, or his attendance at such meetings where representatives of such countries will be in attendance. To make provisions for these special circumstances, it is recommended that a proviso be added reading substantially as follows: "Provided, however, That nothing contained in this subsection shall be construed to prohibit requesting a report when necessary for law enforcement purposes or when the employee is assigned to activities or undertakings related to the national security."

Section 1(e) would generally prohibit interrogation, examination or psychological tests designed to elicit information about an individual's personal relationship with any relatives, his religious beliefs or practices, or his attitude or conduct with respect to sexual matters. The Department is in agreement that such inquiries are not required to determine eligibility for non-sensitive positions. But when it comes to determining the suitability of employees for positions involving a high degree of personal responsibility and often a high degree of psychological pressure or nervous strain, the results of such examinations and psychological tests may produce an important insight. Examples of such positions are those requiring access to nuclear weapons and nuclear weapon systems, chemical and biological warfare information, and operational war plans data. Because of the grave responsibilities, there is a need to evaluate fully the suitability and dependability of each prospective employee to determine the existence of any deep-seated emotional problems involving his family, sex attitudes and conduct. While section 6 permits some limited psychological testing, it applies only to a very limited number of Department of Defense employees (those employed in the National Security Agency) and then only under very restrictive circumstances. Furthermore, even this exception is limited to polygraph examinations and psychological tests, and does not permit an

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employee to be interviewed about derogatory information that has come to the attention of the Department. Oftentimes, these interviews would be less embarrassing than the more formalized polygraph or psychological tests. Employees occupying "critical-sensitive positions" must, of necessary, meet higher standards, and consequently must be examined on matters which would not be considered in determining eligibility for less sensitive positions or non-sensitive positions. By "critical-sensitive" positions, we mean any position the principle duties of which include: (a) access to TOP SECRET information; (b) development or approval of war plans, plans or particulars of future or major or special operations of war, or critical and extremely important items of war; (c) development or approval of plans, policies or programs which affect the overall operations of a department or agency, i.e., policy-making or policy determining positions; (d) investigative duties, the issuance of personnel security clearances, or duty on personnel security boards; or (e) fiduciary, public contact, or other duties demanding the highest degree of public trust. Accordingly, a proviso should be added that would permit the Department to conduct such interrogations, examinations or psychological testing where the position is designated "critical-sensitive." While the Department believes this authority is essential to effective security operations, it would exercise it only where the circumstances warrant it, and then only under properly administered controls.

Section 1(f) would prohibit requiring or requesting an applicant or an employee to take a polygraph test regarding his "personal relationship" with his relatives, his religious beliefs, or his attitude or conduct with respect to sexual matters. Under Department of Defense Directive 5210.48, July 13, 1965, polygraph examinations may be conducted only with the prior written consent of the individual, and if he refused, no adverse action may be taken by the Department. It is believed that this policy should be continued, and that polygraph tests should be permitted in specific security cases which cannot otherwise be resolved, provided the individual voluntarily consents. Accordingly, it is recommended that a clause be added reading as follows: "unless the employee voluntarily consents to such a test in order to resolve specific questions not otherwise resolvable relating to his suitability for employment or suitability for assignment to activities or undertakings related to the national security."

Section 1(g) would prohibit coercion of any employee to contribute to the nomination or election of a person or groups of persons to public office. The Department of Defense supports the objective of this section.

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Section 1(h) would bar coercion in bond drives and fund-raising campaigns, and in that sense reflects the firmly established policy of the Executive Branch and of the Department of Defense. When allegations of coercion have come to the Department's attention -- and they have been relatively few -- generally they could not be substantiated. In the few instances in which the allegations were verified, it was due for the most part, to errors of judgment, excessive zeal or misunderstood communications, rather than any criminal intent to compel or coerce others. Nevertheless, section 1(h), when taken in conjunction with sections 3, 4 and 5(1) would make such acts unlawful, and in the case of a military offender, a basis for court-martial action. The Department of Defense does not consider criminal sanctions in the case of military personnel, or the sanctions contemplated in the bill for civilian personnel, as either enlightened, effective, or appropriate measures for dealing with such conduct. Administrative personnel action is eminently more suitable. We are convinced that creating a specific new crime or establishing specific new sanctions in the context of demonstrably worthy purposes -- the encouragement of bond purchases and the support of charities -- is neither necessary nor desirable. Furthermore, should a military officer deliberatly disregard administrative instructions, ample authority already exists to charge him for failure "to obey any lawful general order or regulation" under Article 92 of the Uniform Code of Military Justice (10 U.S.C. 892). Consequently, the Department of Defense believes that it already has sufficient authority to deal with this kind of coercion complaint.

Section 1(i), by placing restrictions on requiring or requesting an employee to disclose financial information, seriously handicaps the Department's ability to evaluate an individual's personal financial stability and susceptibility to bribes or other financial pressures. Oftentimes sufficient financial information cannot be obtained simply by checking credit agencies, creditors, or other financial institutions. In many instances, the employee must be interviewed and a frank discussion held in order to find the basis for his financial irresponsibility or unexplained affluence. Should the right to make informal inquiries be denied, the Department may be required to initiate disciplinary or removal actions on the basis of information which does not include the employee's denial or explanation. Thus the prohibition not only blunts the Department's investigative effort, but also may operate to the detriment of the employee. Accordingly, it is recommended that the following proviso be added following the first proviso on page 7. "Provided further, That this subsection shall not apply to any employee whose financial responsibility or unexplained affluence has come into question in regard to determining his suitability for assignment to activities or undertakings related to the national security."

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Section 1(j) prohibits requiring an employee, excluded from the protections afforded by section 1(i), to disclose his finances or those of his family except specific items tending to indicate a conflict of interest. It is not clear whether the employee may elect to disclose financial data in a conflict of interest situation, or whether the Department may conclude that a possible conflict exists and that the employee should therefore reveal his financial condition. Under 18 U.S.C. 208 an employee is required to make a full disclosure of his financial interests if he participates personally in his Governmental capacity in any manner in which he, his family or business or associate has a financial interest. Under that statute his failure to make a positive disclosure subjects him to possible criminal prosecution. It is believed that this section should be reconsidered.

Section 1(k) would prohibit interrogation of an employee "under investigation for misconduct" without the presence of counsel, or other person, if he so requests. The Department recommends that the words "or other person of his choice" be deleted. Since this section is designed to protect an employee's legal rights, it is questionable whether the presence of non-legal counsel would assure that protection. Further, this outside party might also be directly or indirectly involved in the investigation, in which event his presence would not be in order.

It is assumed that section 1(k), by providing for the right of counsel to be present, does not carry with it the obligation of the Government to furnish counsel. In some situations, the Department has made available a Government lawyer to insure that the employee has a proper understanding of his rights and obligations. But as a general rule, the Department does not have the capability to furnish a legal adviser in all possible situations covered by section 1(k).

It is also assumed that preliminary questioning to establish whether or not there has been misconduct in the performance of official duties would not be considered within the coverage of section 1(k). In this respect, the Department distinguishes this kind of questioning from the formal questioning which would follow after preliminary inquiries have established the misconduct. To construe this section otherwise would mean that a supervisor's ability to resolve day-to-day employment incidents and to provide constructive guidance concerning an employee's job performance would be replaced by time consuming and expensive legal consultations.

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Section 1(l) prohibits reprisals against an employee who refuses to submit or comply with any requirement made unlawful by H.R. 7199, or who avails himself of the remedies provided by the bill. Reprisals would include discharge, discipline, demotion, denying promotion, relocation, reassignment, or otherwise discriminating in the terms of his employment. While the Department agrees that reprisals have no place in personnel management programs, section 1(l) does raise some practical operating problems. For example, the Department may receive reliable information that an employee occupying a sensitive position has been spending large sums of money far beyond his normal income and that he has been seen in company with foreign agents. Should he be questioned about his unexplained affluence, and should he refuse to answer, the Department might elect to reassign him, pending completion of the investigation. Thereupon, the employee could charge that this action constituted a reprisal within the meaning of section 1(l), when, in fact, the reassignment was but a reasonable and necessary precautionary measure. Under these circumstances, it is believed that this section should be modified by deleting the words "relocate, reassign" from line 9, page 8. The Department should not be foreclosed from taking action of this nature to protect the national security under pain of being threatened with a lawsuit.

Section 2 makes it unlawful for Civil Service employees to violate or attempt to violate any of the provisions of section 1. The Department defers to the views of the Commission on this section.

Section 3 prohibits a military supervisor from requiring or requesting a civilian employee to perform any act or submit to any requirements made unlawful by section 1. The Department agrees that the bill should apply to military officers supervising civilians in the same manner that it applies to civilian supervisors. But section 3, when taken in conjunction with section 5(l), discriminates against military officers by singling them out from all other members of a class and making them the only supervisors who are subject to criminal penalties for misconduct. Because of this, these provisions appear constitutionally questionable and should not be enacted. Actually, an employee is not without remedy if he has cause to believe that his military superior is committing a wrong constituting a crime under the Uniform Code of Military Justice. Under paragraph 29 of the Manual for Courts Martial, 1969, any person having knowledge of the offense may present a violation of the act to duly constituted military authorities. Additionally, from a technical drafting standpoint, section 3

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should be modified to read, in part: "*** under his authority to act with regard to any civilian employee of the executive branch of the United States Government under his authority or subject to his supervision in a manner made unlawful by section 1 of this Act." Section 1 prohibitions are not all cast in terms of "require or request."

Section 4 provides that an employee may sue to enjoin a violation or threatened violation of sections 1, 2 or 3, or obtain redress therefrom without alleging damages or exhausting any administrative remedy. Also, with the employee's consent, any employee organization may file the suit or intervene. The Department is opposed to section 4 for a number of reasons. It would actively encourage the avoidance of agency procedures and permit the filing of frivolous suits. It would overburden the courts inasmuch as evidentiary hearings would be required in many cases. It would undermine grievance and adverse action procedures under the mistaken assumption that present employee grievances are not fairly considered. It would create an independent remedy for one group of grievances, whereas all other grievances would continue to be processed through normal agency grievance procedures. It would vest in employee organizations the right to bring suit or intervene, with the employee's consent, even though the organization has no identifiable interest with the activity with which the employee is assigned, a concept contrary to well accepted principles of employee-management relationships. To meet these objections, it is recommended that the phrase reading, "without regard to whether the aggrieved party shall have exhausted any administrative remedies that may be provided by law," appearing on lines 8 - 10 of page 12, be changed to read, "when the aggrieved party shall have exhausted any administrative remedies that may be provided by law." In addition, it is recommended that the last two sentences of section 4 appearing on pages 12 and 13 be deleted.

Section 5 would create a Board on Employees' Rights to investigate complaints of violations or threatened violations and to conduct hearings. The Board would be empowered to reprimand, suspend, or remove civilian officials violating the act. Military violator cases would be referred to the military departments for prosecution under the Uniform Code of Military Justice. Federal employee organizations could intervene in the proceedings if they are "in any degree" concerned with employment of the category in which the alleged violation occurred. The Department is opposed to the creation of an independent Board, and to the provision calling for the court-martial of military supervisors. Under this section, agency grievance procedures could be circumvented by

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permitting an employee to file a complaint directly with the Board. It would impinge upon the authority of the appointing agency by vesting disciplinary action in an outside agency instead of the appointing agency or the Civil Service Commission. As to the Board's action against military violators, it would create a number of problems. The investigation, hearing and report of the Board would have little direct effect on any court-martial proceedings since these actions would not appear to qualify as a pretrial investigation under Article 32 of the Uniform Code of Military Justice. But, the Board's report recommending court-martial proceedings would raise the spectre of "command influence" since the Board's report would be submitted to the President, the Congress, and the general courts-martial convening authority. It would also violate employee privacy by permitting intervention by employee organizations without regard to the wishes of the employee, and would negate the employee-management system established by Executive Order 11491.

If the Congress decides section 5 should be retained over the objections of the Department, it is recommended that the first sentence of section 5(h) beginning on page 18 be deleted and a new sentence substituted reading substantially as follows: "The Board shall not entertain a complaint from or on behalf of an aggrieved party, unless the remedy sought by him shall have been denied in whole or in part by a final agency decision." Further, in order to provide for the observance of the procedural protections afforded civilian violators by title 5, United States Code, it is recommended that section 5(k)(3)(A) be deleted and the following substituted: "in the case of a civilian officer or employee of the United States, other than any officer appointed by the President, by and with the advice and consent of the Senate, who violates this act, forward its decision to the agency for determination of the severity and application of the penalty to be effected consonant with statutory protections afforded by title 5 of the United States Code."

Section 8 provides that each department may establish its own grievance procedures, but that these procedures shall not preclude a suit under section 4 or a complaint to the Board on Employees' Rights under section 5. The Department firmly believes that an employee should first seek relief through his own department's grievance procedures, and that outside review should be permitted only after completion of Departmental action. Accordingly, the phrase, "but the existence of such procedures shall not

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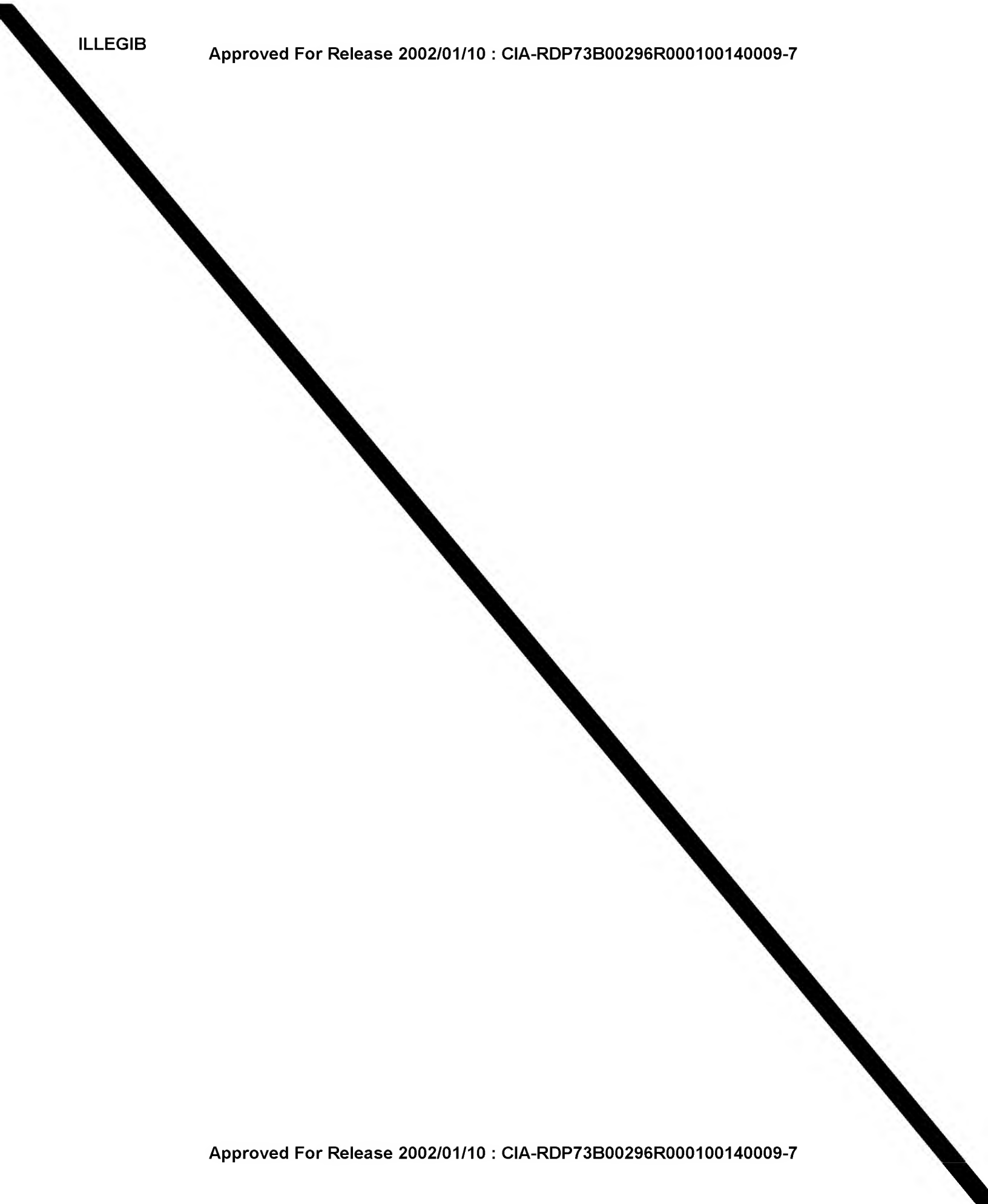

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preclude any applicant or employee from pursuing the remedies established by this Act or any other remedies provided by law," should be deleted. To provide three alternative means of resolution of this particular type of grievance -- one through the traditional grievance system, one through the newly created, but yet administrative, Board on Employees' Rights, and one through immediate access to the United States District Courts, increases the prospects of divergent interpretations which will operate to the advantage of neither the employee nor his supervisor.

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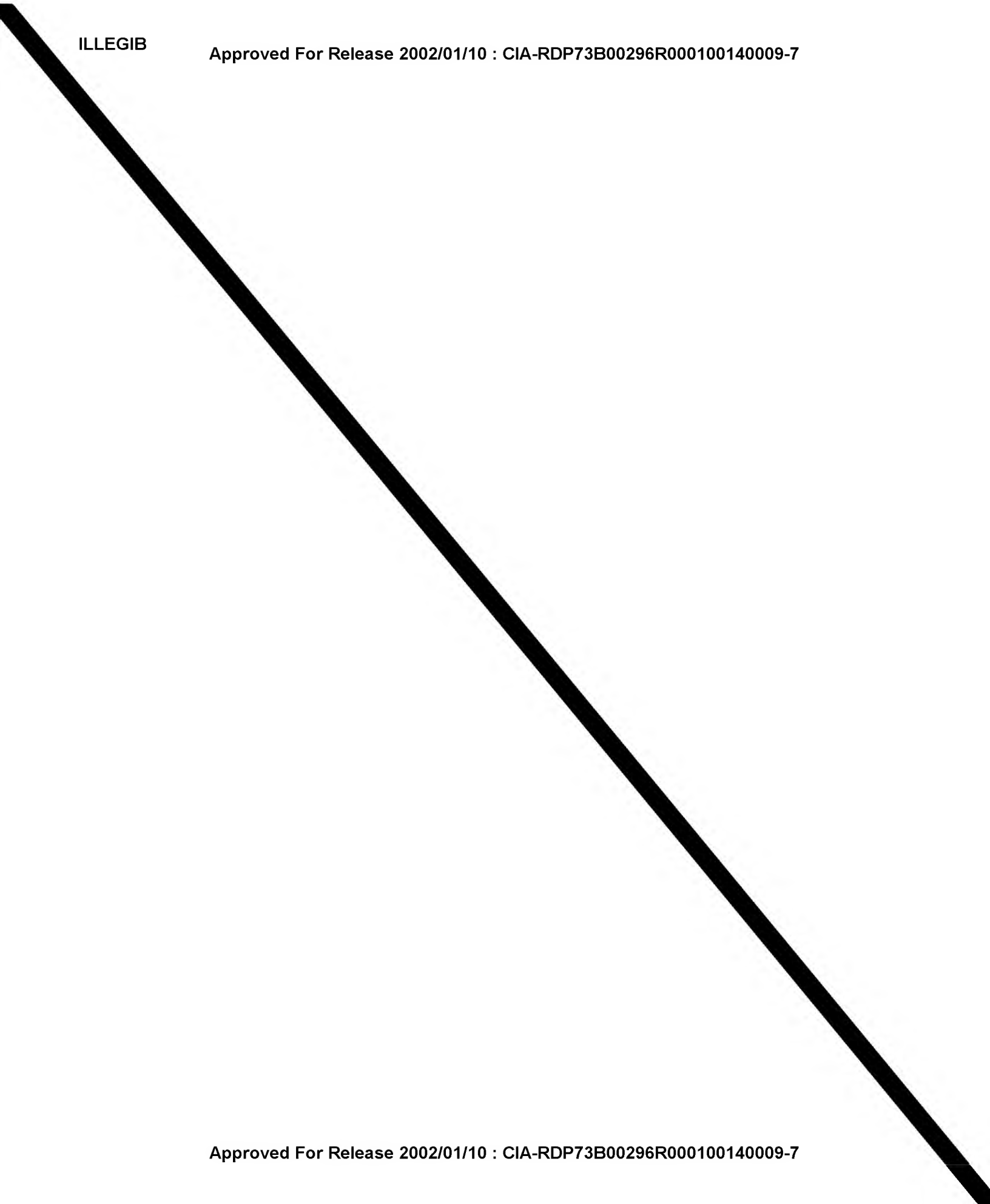

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